No. 22132

IN THE

United States Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY,
Appellant-Defendant

vs.

CHARLES WALKER and HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Appellees-Plaintiffs

Brief of Appellees-Plaintiffs

On Appeal from the United States District Court for the District of Montana

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Page

STATEMENT OF JURISDICTION 1

STATEMENT OF CASE AND ISSUE 1

ARGUMENT 3

1. Effect of Trial Judge's Findings and Conclusions 3

2. Montana Insurance Principles 5

3. Intent of Loading and Unloading and Omnibus Insured 6

4. Distinguishing Appellant's Cases 15

5. Omnibus Coverage Protects Employee of Omnibus Insured 28

6. Montana State District Court Decision 29

CONCLUSION 31

TABLE OF CASES, RULES, STATUTES AND OTHER AUTHORITIES

CASES: Page

Allstate Insurance Company v. *Hill*, 378 F.2d 112 23

American Agricultural Chemical Co. v. *Tampa Armature Works*, 315 F.2d 856 19

American Fidelity and Casualty Co. v. *St. Paul-Mercury Indemnity Company*, 248 F.2d 509 19

American Fidelity & Casualty Co. v. *Indemnity Insurance Company of North America*, 195 F.S. 641, affirmed 308 F.2d 697 22

American Fidelity Co. v. *Deerfield Valley Grain Co.*, 43 F.S. 841 24

American Mutual Liability Insurance Co. v. *Goff*, 281 F.2d 689 4

Associated Indemnity Corp. v. *Wachsmith*, 99 P.2d 420 18

Auto Racing, Inc. v. *Continental Casualty Company*, 304 F.2d 697 ..... 17, 18

Benton v. *Canal Insurance Company*, 130 So.2d 840 17

Birenkott v. *McManamay*, 276 N.W. 725 16

Bushman Construction Company v. *Conner*, 351 F.2d 681; cert. denied, 384 U.S. 906 3

Campbell v. *American Farmers Mutual Insurance Co.* 238 F.2d 284 20

Canadian Indemnity Co. v. *United States Fidelity and Guaranty Co.*, 213 F.2d 658 28

Capitol Finance Corp. v. *Metropolitan Life Insurance Co.*, 75 Mont. 460, 243 Pac. 1061 5

Cimarron Insurance Co. v. *Travelers Insurance Co.*, 355 P.2d 742 ..... 18, 27

Connelly v. London and Lanchire Indemnity Co., 28 At.2d 753 17

Dickinson v. *General Accident Fire and Life Assurance Corp.*, 147 F.2d 396 4

Farmers Elevator Mutual Insurance v. *Austad & Sons, Inc.*, 366 F.2d 555 ..... 21, 23

Fireman's Fund Indemnity Co. v. *Mosaic Tile Co.*, 115 S.E.2d 263 16

General Accident Fire and Life Assurance Corporation, et al v. *Ray Brown*, 181 N.E.2d 191 16

General Aviation Supply Company v. *Insurance Company of North America*, 181 F.S. 380 ..... 20, 27

Glens Falls Indemnity Company v. *United States*, 229 F.2d 370 3

Gulf Insurance Co. v. *Mack Warehouse*, 212 F.Supp. 39 15

Insurance Company of North America v. *Thompson*, 381 F.2d 677 4

Johnson, Drake and Piper, Inc. v. *Liberty Mutual Insurance Co.*, 258 F.S. 603 ..... 4, 26

Page

Kaifer v. *Georgia Casualty Co.*, 67 F.2d 309.....17, 18, 27

Kansas City Fire & Marine Insurance Co. v. *Clark*, 217 F.S. 231 5

Lumbermen's Mutual Casualty Insurance Co. of New York v. *Stukes, et al*, 164 F.2d 571..... 19

Maryland Casualty Co. v. *Tighe*, 115 F.2d 297 8

Maryland Casualty Company v. *American Fidelity & Casualty Co.*, 217 F.Supp. 668 25

Maryland Casualty Company v. *American Fidelity & Casualty Co.*, 330 F.2d 526 24

Michigan Mutual Liability Co. v. *Carroll*, 123 So.2d 920 17

Michigan Mutual Liability Co. v. *Continental Casualty Co.*, 297 F.2d 208 16

Miller and Buchong, Inc. v. *Travelers Insurance Company*, 231 F.S. 128 20

Niewoehner v. *Western Life Insurance Company*, 148 Mont....., 422 P.2d 644 5

Ohio Casualty Insurance Company v. *U.S.F. & G.*, 223 N.E.2d 851 16

Pacific Automobile Insurance Co. v. *Commercial Casualty Co.*, 108 Utah 500, 161 P.2d 423 7

Pacific Employers Insurance Co. v. *Hartford Accident & Indemnity Co.*, 228 F.2d 365 28

Pacific National Insurance Co. v. *Transport Insurance Co.*, 341 F.2d 514 29

Pepsi-Cola Bottling Co. of Charleston v. *Indemnity Insurance Company of North America*, 318 F.2d 714 .....8, 15, 19

Rice Oil Co. v. *Atlas Insurance Co.*, 102 F.2d 561..... 7

Shelby Mutual Insurance Co. v. *Schuitema*, 183 So.2d 571 .....13, 19

Simpson v. *American Automobile Insurance Company*, 327 S.W.2d 519 16

St. Paul Fire & Marine Insurance Co. v. *Thompson*, ...Mont....., ...P.2d....., 24 St. Rep. 714..... 5

State ex rel Butte Brewing Co. v. *District Court*, 110 Mont. 250, 100 P.2d 932 .....8, 28

State Farm Mutual Insurance Co. v. *Employers Fire Insurance Co.*, 123 S.E.2d 108 17

Transport Insurance Company v. *Standard Oil* 337 S.W.2d 284 17

Travelers Insurance Co. v. *General Casualty Co.*, 187 F.S. 234 at 236 29

Travelers Insurance Company v. *Auto-Owners (Mutual) Insurance Company*, 1 Ohio Appeals 2d 65, 203 N.E.2d 846 .....22, 24

Travelers Insurance Company v. *Employers Liability Assurance Corporation*, 367 F.2d 205..... 20

United States Fidelity & Guaranty Company v. *Western Casualty and Surety Company*, 408 P.2d 596..... 18

Walker and Hartford Accident and Indemnity Company v. *Fireman's Fund Insurance Company*, 268 F.S. 899 .....3, 6, 13, 26

STATUTES AND RULES:

Sec. 13-712, Revised Codes of Montana 1947..... 5
Sec. 13-720, Revised Codes of Montana 1947..... 5
Rule 52(a), Federal Rules of Civil Procedure..... 3

OTHER AUTHORITIES:

50 ALR 2d 97 4
95 ALR 2d 1122-1153 4
160 ALR 1259 .....4, 7, 8

Defense Research Institute, Inc., *"Loading & Unloading" Provision of The Automobile Liability Insurance Policy, April 1965*.....11, 12, 13

29 Insurance Counsel Journel, 197 .....10, 11

1963 Proceedings of American Bar Association, Section on Insurance, Negligence and Compensation Law, p. 117 27

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STATEMENT OF JURISDICTION

The plaintiffs and appellees concur in the appellant's "Statement of Pleadings and Facts Establishing Jurisdiction" set forth on pages one and two of appellant's Brief.

STATEMENT OF CASE AND ISSUE

The case statement of the defendant-appellant, Fireman's Fund, is fair. Briefly, an employee (Stewart) of Richard Griel (Fireman's Fund named insured) was injured on October 26, 1965 in the process of loading logs on the Griel truck. The claim was that the heel boom operator, Danny Walker, employed by plaintiff-appellee Charles Walker, was negligent.

There is no dispute the Fireman's Fund truck policy provided liability coverage while the vehicle was being loaded or unloaded with the permission of Griel.

Danny Walker, younger brother of plaintiff Charles Walker, was not sued; it is his brother who is claiming primary coverage under the Fireman's Fund policy as an omnibus insured. By happenstance, Walker had his heel boom insured with Hartford and there is no honest dispute that the Hartford policy would be excess if the limits of the Fireman's Fund truck policy were exhausted.

The Hartford policy provides that it is excess if there is other insurance concerning the use of any non-owned automobile. (Condition 14, Hartford policy) Both policies seem to be identical in all material respects.

It is further agreed that neither Danny Walker nor his employer, plaintiff Walker, employed injured party Stewart. Stewart sued appellee Walker in Montana State Court for the sum of $172,000.00 on April 6, 1966. Defense was tendered appellant who refused. This declaratory action was instituted September 16, 1966.

The sole issue is, as counsel for Fireman's Fund states on page three of their brief — Does the exclusion clause eliminate coverage from Walker because Stewart was an employee of the named insured but not omnibus insured, Walker?

The answer is no and primary coverage rests with Fireman's Fund as will be detailed below.

The transcript of the record which the appellees and plaintiffs have is not numbered. References, when neces-

sary, will be made to the opinion of District Judge Russell Smith found in 268 F.S. 899, Montana, 1967. (Italicized insertions are those of appellees)

ARGUMENT

1. Effect of Trial Judge's Findings and Conclusions

The opinion and order of Trial Judge Russell Smith (page 82 of transcript, 268 F.S. 899) served as Findings of Fact and Conclusions of Law pursuant to Rule 52(a), Federal Rules of Civil Procedure. This was a non-jury declaratory judgment action and this court has declared this to be the rule:

> "It is not the function of this court to retry cases on appeal. Findings of Fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous . . . The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous." (*Glens Falls Indemnity Company* v. *United States,* 229 F.2d 370, 373, 9th CA, 1955)

The Tenth Circuit declares the appellate guidelines to be that, unless "clearly erroneous" the determination by the trial courts of the applicable (*Colorado in that instance*) state, the rule will be upheld. (*Bushman Construction Company* v. *Conner,* 351 F.2d 681, 684; cert. denied, 384 U.S. 906, 10th CA, 1965)

It is to be recalled now that District Judge Smith found as a fact that the policy was ambiguous, pointing out the conflict of appellate decisions. We certainly do not agree with appellant's position that the "great weight of authority" is opposed to the ambiguity or the effect

of the employee exclusion not applying to an omnibus insured whose own employee is not asserting protection of the truck policy against him.

This Court has said:

> "We are required to attach great weight to the District Judge's determination as to the law of the particular state in which he sits . . . It is the duty of a Federal Court, where state law is to supply the rule of decision, to ascertain and apply that law as it may be seen or anticipated." (*Insurance Company of North America* v. *Thompson,* 381 F.2d 677, 681, 9th CA, 1967)

Incidentally, in a very well-reasoned case sustaining the position of the plaintiffs and appellees, it has been said that, "while ambiguity may have its greatest merit in instances of disagreement between the actual contracting parties, it has been applied in numerous situations concerning the loading and unloading coverage." (*Johnson, Drake and Piper, Inc.* v. *Liberty Mutual Insurance* Co., 258 F.S. 603, 610, Minn., 1966, and cases collected at 95 A.L.R. 2d 1122-1153, supplementing 160 A.L.R. 1259 and see 50 A.L.R. 2d, Section 6, page 97, which concerns the issue here presented.)

It is elemental, of course, that Montana law would be controlling here, this being an insurance contract by Fireman's Fund made in Montana with a Montana resident and the accident occurred in Montana. (*Dickinson* v. *General Accident Fire and Life Assurance Corp.,* 147 F.2d 396, California, CA, 1945; *American Mutual Liability Insurance Co.* v. *Goff,* 281 F.2d 689, California, CA, 1960;

Capitol Finance Corp. v. *Metropolitan Life Insurance Co.*, 75 Mont. 460, 464, 243 Pac. 1061; Sec. 13-712, R.C.M., 1947.)

2. Montana Insurance Principles

In a decision rendered October 27, 1967, the Montana Supreme Court re-affirmed the following language, which is patently applicable to Judge Smith's fact finding of ambiguity:

> "But if the terms of the policy are ambiguous, obscure, open to different constructions, the construction most favorable to the insured (*Charles Walker*) or other beneficiary (*Stewart*) must prevail." (*St. Paul Fire & Marine Insurance Co.* v. *Thompson*, ... Mont....., ...P.2d....., 24 St. Rep. 714, 717, quoting *Eby* v. *Foremost Insurance Company*, 141 Mont. 62, 66; 374 P.2nd 857, 1962)

Again, in 1967, the Montana court noted our statute, Section 13-720, R.C.M., 1947, which declares:

> ". . . A contract should be interpreted most strongly against the party who caused the uncertainty to exist . . ."

This means, among other things, that in cases of uncertainty every doubt should be resolved in favor of the insured and the policy should be construed strictly against the insurer. (*Niewoehner* v. *Western Life Insurance Company*, 148 Mont....., 422 P.2d 644, 648, 1967)

District Judge William Jameson collected the Montana cases on this well-known universal rule of liberal construction in *Kansas City Fire & Marine Insurance Co.* v.

Clark, 217 F.S. 231, 235 (D.C. Mont. 1963) an opinion ". . . with which we fully agree . . ." this court said at page 647 of 329 F.2d. This point of liberal construction need not be belabored further, except to observe the application of the rule to this appeal:

> "Here the insured Walker is not concerned because his comprehensive policy with Hartford would cover the loss, but the effect of this decision is to increase Walker's coverage and to extend protection to those in Walker's position who are not otherwise covered. For that reason the interpretation here reached does favor the insured.." (Note 11, 268 F.S. at 902)

3. Intent of Loading and Unloading and Omnibus Insured

The appellees submit this brief could be terminated here; that is, the trial judge has found as a fact there is an ambiguity in the truck policy of Fireman's Fund. This fact is not "clearly erroneous" (Fireman's admit there is a split of authorities on the issue, brief p.6), and the Montana law is to construe such an ambiguity against the carrier and such a construction does give greater protection to Walker, the omnibus insured. As is noted above, the policy of Hartford on the crane would be excess after the Fireman's limits are exhausted. There is no problem in this case, however, about exhausting Fireman's limits. For the court's information, the compromise of the claim of Lester J. Stewart against Charles Walker, was resolved for $18,100.00. The State claim by Stewart against Walker which Fireman's Fund refused to defend, was for $172,000.00 as observed above, and far

in excess of Walker's $25,000 coverage by his Hartford policy.

However, to rule out any doubt in the court's mind, we turn to the "intent" of the loading and unloading coverage, the omnibus insureds, and the decisions which support the trial court's judgment. This, and being repititious, is simply that the employee exclusion of Fireman's policy, quoted on page 5 of appellant's brief, applies only to an employee of the omnibus insured claiming coverage.

Insurance is a contract, of course, and must be so interpreted as to give effect to the intention of the parties. (*Rice Oil Co.* v. *Atlas Insurance Co.,* 102 F.2d 561, 522, 9th CA, 1939)

No contention is made by the appellant that the loading and unloading coverage has no meaning whatsoever. It is agreed Walker's employee was "loading" logs on the Griel truck driven by Stewart and was using the truck with the permission of truck owner Griel, and Stewart was injured in the loading process. It appears conceded that if the writer was gratuitously assisting and was injured while the truck was being loaded, Fireman's Fund policy would be primary.

That the loading and unloading clause is a phrase of expansion of coverage seems to be universally agreed (*Pacific Automobile Insurance Co.* v. *Commercial Casualty Co.,* 108 Utah 500, 161 P.2d 423, 160 A.L.R. 1259, 1945). It is the position of the appellees and plaintiffs, of course, that the exclusion applies only if, for example, Stewart

sued his employer Griel, or a co-employee. The Workmen's Compensation exclusion also eliminates coverage in that instance.

There also seems no question or contention by Fireman's Fund that if the trial court is sustained, the truck policy of Fireman's is primary. (*Maryland Casualty Co.* v. *Tighe,* 115 F.2d 297, 9th CA, 1940; *State ex rel Butte Brewing Co.* v. *District Court,* 110 Mont. 250, 100 P.2d 932, 1940, Annotation 160 A.L.R. 1259. We call particular attention to *Pepsi-Cola Bottling Co. of Charleston* v. *Indemnity Insurance Company of North America,* 318 F.2d 714, 4th CA, 1963, which the appellees now quote with appropriate italicized insertions of the parties involved in this appeal):

> "Concededly, able authority supports the opposite view (*appellant's view*). E. G., *Kelly* v. *State Auto Ins. Ass'n,* 288 F.2d 734 (6 Cir., 1961); *American Fid. & Cs. Co.* v. *St. Paul-Mercury Indemn. Co.,* 248 F.2d 509 (5 Cir., 1957). Equally reputable precedents, however, hold the insurer (*Fireman's Fund*) obligated to respond to a claim made against one insured by a person not in its employ but in the employ of another insured (*Walker*) under the same policy. *Gulf Ins. Co.* v. *Mack Warehouse Corp.,* 212 F.Supp. 39 (E.D. Pa. 1962); *General Aviation Supply Co.* v. *Insurance Co. of N. America,* 181 F.Supp. 380 (E.D. Mo.), aff'd, 283 F.2d 590 (8 Cir., 1960); *Ginder* v. *Harleysville Mut. Cas. Co.,* 49 F.Supp. 745 (E.D. Pa. 1942)2, aff'd, 135 F.2d 215 (3 Cir., 1943). See Annot., 50 A.L.R. 2d 78, 97 (1956). Unfortunately for us the Supreme Court of West Virginia has not considered the question. Judge Parker writing for this court left it open, but with a strong implication of agreement with the conclusion we have here expressed, in *Lumber Mutual Casualty Ins. Co.* v. *Stukes,* 164 F.2d 571,

574 (4 Cir., 1947). In the same direction, although not squarely apposite fact-wise, is the decision of the late Judge Ben Moore of the Southern District of West Virginia, in *Farm Bureau Mut. Auto. Ins. Co.* v. *Smoot,* 95 F.Supp. 600, 603 (1950).

This construction accords with the rudimentary rule of interpretation that the court should ferret out and pursue the intent and purpose of the policy. No reason is shown why an insured should not be indemnified against a claim of one outside *that* (*Griel*) insured's employment. Again, admittedly, one of the objects of the exclusion is to avoid duplication of coverage with employee compensation insurance. Moreover, the hornbook requirement is apt, that the policy wherever ambiguous should be read against its scrivener. Here Indemnity (*Fireman's Fund*) could readily have unequivocally excluded the coverage now resting upon it. *General Aviation Supply Co.* v. *Insurance Co. of N. America, supra,* 181 F.Supp. 380, 384. The omission implies an intent not to seek such an exemption.

Strongly persuasive, if not conclusive, of the soundness of the District Judge's holding is the policy's Severability of Interests clause:

> 'The term "the insured" is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.'

This provision compels consideration of each insured separately, independently of every other insured. Its effect here is to segregate Elk (*Griel* and *Fireman's Fund*) and Pepsi (*Walker*) in the ascertainment of the coverage of each. In this isolation the reference to an employee of an insured designates solely that insured who is his employer. It does not allow such employment to be attributed to another insured who

in truth is not the employer. *Gulf Ins. Co.* v. *Mack Warehouse Corp., supra,* 212 F.Supp. 39, 43; *General Aviation Supply Co.* v. *Insurance Co. of N. America, supra,* 181 F.Supp. 380.

But regardless of the two-fold protection of Pepsi by both Indemnity and Travelers, *primary* coverage was placed on Indemnity (*Fireman's Fund*) by the District Court under the Other Insurance clause of Travelers' policy. That section provides:

> '*Other Insurance.* If the insured has other insurance * * * the insurance under this policy with respect to loss arising out of * * * the use of any non-owned automobile shall be *excess* insurance over any other valid and collectible insurance.' (accent added)

The governance here of this provision is perfectly manifest. The decisions are almost unanimous in according such efficacy to the clause. *American Surety Co. of N.Y.* v. *Canal Ins. Co.*, 258 F.2d 934, 936 (4 Cir., 1958) (and cases there cited). Travelers' (*Hartford's*) policy cannot be enforced against its terms, and, therefore, neither Indemnity (*Fireman's Fund*) nor Pepsi (*Walker*) can impress upon it any liability before exhaustion of the other policy."

To buttress further the intent of the insurance industry itself, we quote from an authoritative article by Norman E. Risjord, Vice-President and General Counsel of the Employers Re-insurance Company of Kansas City, Missouri, writing in 29 Insurance Counsel Journal, 197 at pages 207, 208, in 1962:

> "You will remember that there were many cases holding or assuming that the employee exclusion in the automobile policy applies only where the injured is an employee of the person claiming coverage. That

> was and is my position, partly because I happen to *know* that was the underwriting intent and it pains me to see the companies even raise (*in this appeal, Fireman's Fund*) say nothing of prevail with, the defense that the words "the insured" in the employee exclusion means any insured, so that no insured has coverage for injury to an employee of any person who is or might be under the policy."

In the same insurance industry journal at page 215, Risjord declared the guiding principles of the Combined Claims Committee of July 21, 1958, and the Pacific Claims Executive Committee at a meeting October 23-24, 1961, in Monterey, California, generally agreed as follows:

> "That where a vehicle is being loaded or unloaded at a customer's premises and a member of the public or (*you will especially notice*) the driver is injured by reason of the negligent acts of the employees of the customer (*this would be Danny Walker, Charles Walker's employee*) engaged in the loading or unloading, the loss should fall upon the automobile insurer."

The loading and unloading provision of the automobile liability insurance policy was the subject of a monograph prepared by the Defense Research Institute, Inc., of Milwaukee, in April, 1965. We assume the court will take judicial notice that this Institute has most of the companies in the insurance liability field as members.

On page fourteen of the mentioned monograph, we find this language written by Edward C. German, a Philadelphia lawyer, Director of the Defense Research Institute and Secretary-Treasurer of the Federation of Insurance Council.

> "Further, the courts which hold that the employee and co-employee exclusions apply if a person is an employee of any of the insureds have either not understood or have ignored the 'severability of interests clause' in the insurance policy. That clause reads: 'The term "Insured" is used severally and not collectively, but inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.' The 'severability of interests clause' fundamentally and essentially is an explicit statement of what the courts have said was implicit meaning of the word 'insured.' The courts which have said that they must look to the person seeking coverage in construing the exclusion, have held that the addition of the 'severability of interests clause' indicate that the drafters of the policy, by the addition of such clause, intended to define the word 'insured' as only the person claiming coverage."

Mr. German then cites these cases:

> "*City of Albany* v. *Standard Accident Insurance Co.*, 7 N.Y.2d 422, 165 N.E.2d 869; *Insurance Company of North America* v. *General Aviation Supply Co.*, 283 F.2d 590, Second Circuit, 1960; *Kern* v. *Security Insurance Co.*, 195 F.S. 562, Arkansas, 1961."

Thus, this Philadelphia lawyer, writing for a defense organization, agrees completely with the position of Walker and Hartford here.

Further, Mr. German writes at page twelve of the April 1965 Bulletin, that:

> "An increasing number of the courts have construed the exclusion strictly against the insurer and have held that an employee of an insured, other than the insured who invokes the coverage of the policy, is not within the language of the employee exclusion."

This is directly contrary to the statement of appellant's counsel that:

> "It is believed that this latter fact clearly discloses the modern trend is strictly adverse to Hartford's position herein." (page 7, Brief)

We submit this statement is in error both as to the trend and the inference that Hartford is the only true appellee. The court will note that the declaratory judgment complaint was verified by Charles Walker on September 14, 1966. It will further note that the suit of Stewart against appellee Walker sought $172,000.00 in damages. As a matter of fact, limits of liability of Walker's Hartford policy was only $25,000.00 and he definitely was in an exposed position of personal liability.

It is to be noted that Trial Judge Smith considered the Insurance Counsel Journal article and cites it as Note 7 at page 901 of 268 F.Supp.

A very thorough 1966 Florida decision, *Shelby Mutual Insurance Co.* v. *Schuitema,* 183 So.2d 571 at 573, is squarely in point. We quote at length so that the Court will be fully informed of the reason of this addition (severability of interests) to automobile policies with loading and unloading coverage after 1955:

> "Under the standard automobile policy in use before 1955 there was a split of authority as to whether coverage was provided under facts similar to the instant case. See Annot., 50 A.L.R. 2d 99. In 1955 the insurance underwriters attempted to eliminate the confusion of interpretation then existing by adding the 'severability of interests' clause here involved. It appears to be the virtually unanimous opinion of

the legal scholars writing on the subject that the purpose of the addition of the severability of interests clause was to provide coverage under the facts in the instant case. Risjord & Austin, 'Who is the "Insured" ' Revisited, 28 Ins. Counsel J. 100 (1961); Thomas, The New Standard Automobile Policy; Other Provisions, 393 Ins. L. J. 653 (1955); Brown & Risjord, Loading and Unloading, The Conflict Between Fortuitous Adversaries, 29 Ins. Counsel J. 197 (1962); Breen, The New Automobile Policy, 388 Ins. L. J. 328 (1955). Since the adoption of the severability of interests clause in a policy which would or might apply to several insureds, the term 'the insured', as used in the exclusions and conditions of the policy, means only the person claiming coverage. Thus, for example, the exclusion for injury to an employee of 'the insured' deprives no one of coverage except with respect to his own employees. This is true because the term 'the insured' is used severally and not collectively. Risjord & Austin, Standard Family Automobile Policy, 411 Ins. L. J. 199. We find ourselves unable to adopt a conclusion that the policy affords less coverage than that which the industry generally intended to provide. We believe the decisions to the contrary relied upon in the Liberty Mutual decision have followed the line of no coverage decisions existing before the adoption of the severability of interests clause, thereby in effect giving no meaning to the addition of this clause. This is apparent by a study of the decision principally relied upon, *Transport Ins. Co.* v. *Standard Oil Co. of Texas,* 1960, 161 Tex. 93, 337 S.W.2d 284. This decision was adopted four to three and was based in part on *American Fidel. & Cas. Co.* v. *St. Paul-Mercury Indemn. Co.,* 5th Cir. 1957, 248 F.2d 509. The author of the latter decision, Judge Brown, later noted that in American Fidelity there was no severability of interests clause and that in his view where there was a severability of interests clause the result would be

necessarily different. See Brown's concurring opinion in *American Agriculture Chemical Co.* v. *Tampa Armature Works, Inc.*, 5th Cir. 1963, 315 F.2d 856. We find ourselves unable to agree with the conclusion that the addition of the severability of interests clause would produce no change in the construction given to policies existing prior to the inclusion of that clause."

The Florida court also noted that it was apparent that the parties intended to furnish coverage to persons other than the named insured and that the effect of the severability of interests clause is to make it certain that, when a claim is asserted against one who is an insured under the policy, then that person becomes "the insured" for the purpose of determining the insurer's obligation with respect to that claim. The exclusion as to employees of the insured is thus limited and confined to the employees of the employer (*here Charles Walker*) against whom the claim is asserted. The forward recites the well-reasoned 4th Circuit case of 1963, *Pepsi Cola Bottling Co.* v. *Indemnity Insurance Co.*, 318 F.2d 714 and *Gulf Insurance Co.* v. *Mack Warehouse*, Pa., 1962, 212 F.Supp. 39.

4. Distinguishing Appellant's Cases

The appellant cites certain cases in its Brief. Most of them can be readily distinguished from the insurance contract involved here. The page of the appellant's Brief is designated. Few of the following cases discusses the "severability of interests" present in Fireman's policy. As noted above, this was added in 1955 to clarify the underwriting intent and, as stated below, some of these acci-

dents occurred that year, 1955, or before.

Simpson v. *American Automobile Insurance Company,* 327 S.W.2d 519, Missouri, 1959, brief p. 12. The case arose out of an accident on April 28, 1955. It is distinguished in 181 F.S. 384, *supra.*

Fireman's Fund Indemnity Co. v. *Mosaic Tile Co.,* 115 S.E.2d 263, Georgia, 1960, brief p. 14. The trial court there, incidentally, was for coverage. The accident date was November 29, 1955 and no cases adverse to appellant's position are even mentioned.

General Accident Fire and Life Assurance Corporation, et al v. *Ray Brown,* 181 N.E.2d 191, Illinois, 1962, brief p. 15. The Illinois court found there was no proof the injured party was using the insured truck at the time he was injured and hence discussion about who is "the insured" appears to be unnecessary. In the discussion they rely on the Seventh Circuit decision of *Michigan Mutual Liability Co.* v. *Continental Casualty Co.,* 297 F.2d 208. This decision does not discuss the severability of interests clause. *Ohio Casualty Insurance Company* v. *U.S.F. & G.,* 223 N.E.2d 851, Illinois, 1967, simply cannot be justified, in our view. Page 27, brief.

Birenkott v. *McManamay,* 276 N.W. 725, South Dakota, 1937, brief p. 15. This case is clearly not in point. The injured party was injured in the course and scope of his employment and sued his employer, the insured. The exclusion of an employee suing the named insured, his employer, was upheld. We have no quarrel with this.

Benton v. *Canal Insurance Company,* 130 So.2d 840, Mississippi, 1961, brief p. 18. This case is adverse to the appellees but relies on the Texas case of *Transport Insurance Company* v. *Standard Oil,* 337 S.W.2d 284. And, as we have previously noted, three Texas judges dissented and pointed out the majority did not cite one case which contained the severability of interests addition of 1955.

Michigan Mutual Liability Co. v. *Carroll,* 123 So.2d, 920, Alabama, 1960, brief p. 21. Severability was not discussed in this case which involved a November 24, 1955 injury. The Alabama case does note that the Ninth Circuit decision of *Kaifer* v. *Georgia Casualty Co.,* 67 F.2d 309 is adverse to their holding.

Connelly v. *London and Lanchire Indemnity Co.,* 28 At.2d 753, Rhode Island, 1942, Brief p. 21. The case is not in point. There a chauffeur of the insured wrecked the car, killing two maids of the named insured who were with him. The court found the maids were not in the course and scope of their employment at the time and hence the auto carrier afforded coverage.

State Farm Mutual Insurance Co. v. *Employers Fire Insurance Co.,* 123 S.E.2d 108, North Carolina, 1961, brief p. 22. Severability was not discussed and the fact situation was that the employee of a named insured sued the omnibus insured operating the employer's car. It was held that the employees of a named insured cannot recover from the carrier of the named insured.

Auto Racing, Inc. v. *Continental Casualty Company,* 304 F.2d 697, CA, Oklahoma, 1962, Brief p. 20. The Tenth

Circuit very carefully points out that the case before it, excluding from coverage all persons employed on or about a fairground, was to be distinguished from the fact situations presented in *Kaifer* v. *Georgia Casualty Co., supra,* 9th CA, and *Cimarron Insurance Co.* v. *Travelers Insurance Co., supra,* 355 P.2d 742. At page 698 of 304 F.2d the Tenth Circuit stated:

> "The careful reading of the cases cited (*such as Kaifer*) to support this position (*of coverage*) convinces us that they are not applicable to our situation."

Associated Indemnity Corp. v. *Wachsmith*, 99 P.2d 420, Washington, 1940, Brief, p. 16. This case involved the September 17, 1935 occurrence, twenty years before the addition of the severability of interests. Furthermore, it is, as other cases the appellant has cited, a suit by the employee of the named insured against another employee of the named insured. This situation, of course, we do not have in this present appeal.

United States Fidelity & Guaranty Company v. *Western Casualty and Surety Company,* 408 P.2d 596, Kansas, 1965, Brief p. 17. The severability of interests addition of 1955 was not mentioned in this Kansas case. Appellant's counsel quotes that liberal construction does not apply in the dispute between two insurance companies.

As we have mentioned, the omnibus insured (*Walker*) at the time this declaratory judgment was filed, had a distinct interest in a ruling Fireman's Fund was primary coverage and his own carrier was excess.

Reliance is particularly placed on the case of *American Fidelity and Casualty Co.* v. *St. Paul-Mercury Indemnity Company*, 248 F.2d 509, 5th CA, 1957. See page 22, appellant's Brief.

Circuit Judge Brown is the Brown of Brown and Risjord who had a lengthy discussion in 29 Insurance Counsel Journal, beginning at page 197.

As noted by the Florida *Shelby Mutual* case, *supra,* this very Circuit Judge Brown in a 1963 decision in a concurring opinion discussing the "intent problem" of insurance policies, indicated the severability of interests addition in 1955 was of significance and that the *St. Paul-Mercury* decision (248 F.2d 509) upon which many courts relied and where there was no severability of interests, may have transmuted a cross-employee exclusion of an Alabama case into a "legendary white-horse case" which adopted his *St. Paul-Mercury* decision. (*American Agricultural Chemical Co.* v. *Tampa Armature Works,* 315 F.2d 856, 863, Note 9.)

Thus, with the 1955 severability of interests addition, we respectfully submit the so-called *St. Paul-Mercury* case, 248 F.2d 509, is not authority for appellant's position.

The Fourth Circuit is cited on page seven as sustaining appellant's position. The case cited is on page ten of appellant's brief, *Lumbermen's Mutual Casualty Insurance Co. of New York* v. *Stukes, et al,* 164 F.2d 571, 4th CA, South Carolina, 1947.

No mention was made of *Pepsi-Cola Bottling Com-*

pany of Charleston v. *Indemnity Insurance Company of North America, supra,* a 1963 decision, 318 F.2d 714 which we have quoted in length and directly sustains the position of Trial Judge Smith.

Attention is directed to a 1966 Fourth Circuit decision involving Maryland law which cited the *Pepsi-Cola* decision with approval. (*Travelers Insurance Company* v. *Employers Liability Assurance Corporation,* 367 F.2d 205 at 207.)

The Eighth Circuit case of *Campbell* v. *American Farmers Mutual Insurance Co.,* 238 F.2d 284, CA Missouri, 1956, cited on page 21 of appellant's Brief is not in point. There the direct employee, a school teacher of the assured school district, sued the district. The point decided was that she was such an employee in the course and scope of her employment by the named insured at the time of the one-vehicle accident and the employee exclusion applied. We have no quarrel with this decision. Appellant does not mention a 1960 Missouri decision which, reviewing all the authorities and determining precisely the effect of the "severability of interests" provision, ruled as Trial Judge Smith did. (*General Aviation Supply Company* v. *Insurance Company of North America,* 181 F.S. 380, Mo., 1960, affirmed by the 8th Circuit, 283 F.2d 590.)

Appellants cite on page 21 of their brief *Miller and Buchong, Inc.* v. *Travelers Insurance Company,* 231 F.S. 128, Penn., 1964. The court in that case relied on a 1963 Pennsylvania decision in which the private automobile

carrier excluded from coverage any member of the family of the insured. A son of the insured, as a passenger, was injured when another party was driving the car with permission of the father of the injured boy. There was no mention of the severability clause, no citing of authorities to the contrary, and the court simply projected what it assumed would be the Pennsylvania rule.

We suggest the Eighth Circuit case of *Farmers Elevator Mutual Insurance Co.* v. *Austad & Sons, Inc.*, 366 F.2d 555, CA North Dakota, 1966, can be distinguished. The case is mentioned on page 27 of appellant's Brief. The basic holding was that the omnibus insured was not "using" the insured truck at the time of the accident. The court then said the district judge stated a "permissible conclusion" although it appears the conclusion was not necessary, that the North Dakota Court might have held the exclusion clause applies to suits by an employee of the named insured against anyone. There is no discussion of the effects on severability of interests clause or whether such a clause was in the truck policy. Furthermore, the decision of Fifth Circuit Judge Brown (no severability provision present) in which the phrase "fortuitous adversaries" is first used, is relied upon. (Note 2, page 557 of 366 F.2d, 8th CA, North Dakota)

As discussed above in the intent of the coverage, loading and unloading was an extension of coverage, it was intended to increase the coverage of the truck policy during the loading and unloading process as long as the truck was being utilized. This is the precise situation we

have in this appeal by Walker.

At page 22 appellant relies upon the Ohio case of *American Fidelity & Casualty Co.* v. *Indemnity Insurance Company of North America,* 195 F.S. 641, Ohio, 1961, affirmed 308 F.2d 697, 1962. The District Court decision involved a January 29, 1959 injury and there was no discussion or mention of the severability of interests clause. There was also no reported Ohio case in point and a trial court judge felt obliged to follow previous Sixth Circuit decisions.

However, the Ohio Court of Appeals in a case three years later, 1964, *Travelers Insurance Company* v. *Auto-Owners* (*Mutual*) *Insurance Company,* 1 Ohio Appeals 2d 65, 203 N.E.2d 846, while noting the Sixth Circuit decisions, took exception and said the Ohio law was contrary and the employee of the omnibus insured was protected by the vehicle policy when the employee of the named insured sued the omnibus insured.

The Ohio court flatly stated that what it called "the minority view," namely sustaining the position of the appellant here, is apparently followed in about four states, citing Florida, Mississippi, Washington and Texas. (*Travelers Insurance Co.* v. *Auto-Owners* (*Mutual*) *Insurance Co.,* 203 N.E.2d 846 at 849) The Ohio case is squarely in point and after noting that the minority view in the Sixth Circuit Court decisions are in effect re-drafting the insurance policies, they pose this question. Again we will interpolate the parties to this present appeal where applicable.

"In considering this exclusion clause, it is again important to simply reverse the position of the parties as was done above in discussing the general exclusion clause. In the present case it was the employee (*Stewart*) of the named insured (*Griel*) who was injured by an additional or omnibus insured. (*Danny and Charles Walker*) In the exact reverse situation an additional or omnibus insured (*Danny Walker*) is injured by the named insured (*Griel*) or its employee, i.e., Randolph's employee (*Stewart*) injures a Goodwill (*Walker*) employee. Obviously this would lead to a suit against the named insured (*Griel*). Under the wording of the employee exclusion clause, here the one fits just as tightly as the other! Again, the result of appellant's interpretation and that of the minority view is a substantial loss of coverage to the named insured (*Griel*) with respect to the very liability for which it purchased protection."

After noting the Federal Court would be bound to follow the law of the particular state involved, Ohio declared:

"The weight of authority clearly holds that the separability of multiple insureds applies equally well to the employee-exclusion clause." (Page 849 of 203 N.E.2d 846)

The 1964 Ohio decision is cited for the position of the plaintiffs-appellees in this present appeal by the Eighth Circuit in *Farmers Elevator Mutual Insurance Co.* v. *Austad,* 366 F.2d 555, 558, 1966.

In a decision of the Sixth Circuit decided just this June involving a cross-employee exclusion clause (not in issue in this present *Walker* appeal) the Sixth Circuit noted that the *Auto-Owners* (*Mutual*) *Insurance Company* case, *supra,* is still the law of Ohio. (*Allstate Insurance*

Company v. *Hill,* 378 F.2d 112 at 115, Ohio, CA 1967)

Yet another case cited by the appellant on page 22 of his brief is clearly distinguishable. In *American Fidelity Co.* v. *Deerfield Valley Grain Co.,* 43 F.S. 841, Vermont, 1942, all that was involved was an employee directly suing his employer and co-employees for injury arising out of the course and scope of his employment. The court held the employee-exclusion clause applied; there was no mention of loading and unloading or omnibus insured questions or severability as they were irrevelant.

Again on page 22 of the Brief another Sixth Circuit case is cited, *Maryland Casualty Company* v. *American Fidelity & Casualty Company,* 330 F.2d 526, an April, 1964 decision involving Tennessee law.

The Sixth Circuit noted that the district judge expressed the opinion that if the issue (omnibus insured being sued by named insured's employee) was an open one in Tennessee, he would rule that the employee-exclusion clause did not deny coverage to the omnibus insured under the defendant's policy. The Circuit went on to say that the district judge felt constrained under decisions of the Sixth Circuit in the Ohio *Travelers Insurance* case (262 F.2d 132) and the *Kelly* case (288 F.2d 734) to rule coverage did not exist for the omnibus insured. The 1964 *Maryland Casualty* decision noted that only the laws of two states had been construed by it, there being no state decisions on the subject, and one was Ohio. As observed above, Ohio in 1964 disagreed with the Sixth Circuit in *Travelers Insurance Company,* 203 N.E.2d 846.

As a matter of fact, the District Judge in Tennessee at page 690 of 217 F.S. collects the cases in footnote 1 holding there is coverage, such as plaintiffs and appellees here urge, citing cases from California, Indiana, Louisiana, Minnesota, Missouri, New Jersey, New York, Ohio, Oregon and the Fifth Circuit. We have difficulty comprehending the appellant's statement that the clear weight of authority and the trend favors the appellant's position.

District Judge Wilson at page 691 of 217 F.S. (as did Trial Judge Smith) after noting the authorities, observed:

> "From the foregoing, is it not clear that the only thing that can be said with certainty is that an ambiguity exists with regard to the meaning of the phrase 'the insured' as used in exclusion (d) and (e)? This conclusion would seem inescapable from the mere fact there are so many conflicting opinions in the cases themselves as to what this policy language means."

Actually, there need not be this confusion in our view. Certainly the insurance industry has been quite aware of this problem and the Tennessee District Judge in 217 F.S. 688 wondered why the language was not changed. Certainly it would be very simple to say, if such was the intent rather than to expand the coverage under loading and unloading, to exclude coverage for the "employee of the named insured or omnibus insured?" This they did not do and as Risjord noted above, they didn't intend to. The answer is just that simple.

As a Minnesota Federal Judge wrote in 1966:

> "In answer to the possible argument that the latest Minnesota cases expanding the scope of coverage under 'loading-unloading' clauses were unknown to defendant when the contract was drawn, the fact remains that the failure to adopt restrictive language, in light of the numerous decisions in all jurisdictions construing these clauses, and the lack of a clear position under Minnesota law, weighs most heavily against any hindsight contention by defendant (vehicle carrier) that it intended anything but the broadest scope the law allows to such unrestrictive language." (*Johnson, Drake & Piper, Inc.* v. *Liberty Mutual Insurance Co.,* 258 F.S. 603 at 610, Minn. 1966)

The appellees would be closing their eyes not to recognize there are a few jurisdictions (certainly not the great weight of authority or the like) which have misconstrued what was meant seemingly because it struck them this was a risk to which a fellow in the place of appellee Charles Walker should not benefit. Simply assume Charles Walker was not insured as we suppose often is the case in a loading and unloading situation. The injured employee of the named insured would have no recourse, except Workmen's Compensation. This Trial Judge Smith recognized in Footnote 11, page 902 of 268 F.S. quoted above:

> "Here the insured Walker is not concerned because his comprehensive policy with Hartford would cover the loss, but the effect of this decision is to increase Walker's coverage to extend protection to those in Walker's position who are not otherwise covered. For that reason interpretation here reached does favor the insured."

A well-reasoned case collecting the authorities to

1960 sustaining appellee's position here is *General Aviation Supply Co.* v. *Insurance Company of North America,* 181 F.S. 380, Missouri, 1960. The decision was affirmed at 283 F.2d 590, 8th CA.

The Missouri Federal Court had squarely before it the effect of the severability clause and declared the employee's exclusion should be limited and confined to the employees of the employer who seek the protection. (181 F.S. page 384) The Court further stated, citing *Kaifer* v. *Georgia Casualty Co.,* 67 F.2d 309, 9th CA, 1933, that:

> "In setting forth exclusions there is no apparent reason why the insurance carrier (*Fireman's Fund*) cannot be specific and clear in its designations."

As this court is undoubtedly aware, the *Kaifer* case, *supra,* is universally cited for the rule urged by the appellees; namely, if the omnibus insured is not the employer of the insured person nor an employee of the named insured, the auto policy is responsible. (e.g. 50 A.L.R.2d page 97, and see 1963 Proceedings of American Bar Association Section of Insurance, Negligence and Compensation Law, page 117)

An exhaustive discussion sustaining the position of the appellees here is *Cimarron Insurance Co.* v. *Travelers Insurance Co.,* Oregon 1960, 355 P.2d 742. The decision observes "the insured" is ambiguous (page 750 of 355 P.2d) and this must be construed against the insurer in the position of Fireman's Fund. Trial Judge Smith noted the *Cimarron* case and concluded it would be persuasive with Montana (Note 10, page 901 of 268 F.S.) We refer

the Court to a more or less pioneering decision of Montana, *State ex rel Butte Brewing Co.* v. *District Court,* 110 Mont. 250, 100 P.2d 932, 1940, for the approach the Montana Court takes. This state is committed to the "completed operations" rule in loading and unloading, which is and would be an extension of coverage. The appellees have every confidence if the question involved in this appeal were put to the Montana Court, the appellees would prevail.

5. Omnibus Coverage Protects Employee of Omnibus Insured

The following discussion was not commented upon by the trial judge but furnishes a substantial reason for reaching the result of Trial Judge Smith and, we submit the intention of the insurance industry.

The Ninth Circuit furnishes the reason.

The general rule is that if an employee (*here Danny Walker*) is negligent, then the employer (*Charles Walker*) who is responsible because of *respondeat superior,* may recover from the employee any loss. (*Pacific Employers Insurance Co.* v. *Hartford Accident & Indemnity Co.,* 228 F.2d 365, 370, 9th CA, 1955.)

Further, that the carrier paying this vicarious obligation is subrogated to the recovery right against the negligent employee. This would be Hartford against Danny Walker. (*Pacific Employers Insurance Co., supra,* 228 F.2d 365 at 370 and 371. See also *Canadian Indemnity Co.* v. *United States Fidelity & Guaranty Co.,* 213 F.2d

658, 9th CA, 1954.)

The Eighth Circuit, quoting from *Travelers Insurance Co.* v. *General Casualty Co.,* 187 F.S. 234 at 236, Idaho, 1960, a loading and unloading case sustaining the appellees, said:

> "The reason for this rule is obvious. It prevents multiplicity of suits and holds the insurer liable (*Fireman's Fund*) who by a circuity of actions would eventually be obligated to pay any judgment rendered against the employer resulting from the negligence of his employee." (*Pacific National Insurance Co.* v. *Transport Insurance Co.,* 341 F.2d 514, 518, 8th CA, 1965)

In this case then, Danny Walker would be liable to his employer, appellee Charles Walker for Danny's alleged negligence. It is Danny Walker, as well as Charles Walker, who are insured by loading the logging truck with permission. Obviously, Hartford had no agreement to indemnify Danny Walker, if his employer claimed against him for any judgment or compromise. Thus, the loss falls precisely where intended, back to Fireman's Fund who have agreed to accept Danny Walker as an omnibus insured while utilizing the logging truck they insure.

6. Montana State District Court Decision

On pages 27-30, the appellant calls the attention of the court to a Cascade County, Montana decision, now on appeal to the Montana Supreme Court, *Travelers Insurance Company* v. *American Casualty Company, et al.*

The Cascade County case is assigned number 66532-C in that Court. Counsel for appellees here did not appear.

The July 12, 1967 opinion involves certain facts which are dissimilar to this appeal by Fireman's Fund. Garbage cans were claimed to be negligently loaded with heavy combustible material, contrary to a Great Falls ordinance, by the Travelers' insured. One issue was whether the Travelers' insured should have known such a heavily loaded container might injure a person attempting to lift the same. It was found as a fact that this negligence occurred prior to the actual loading of the truck. Therefore, the Travelers' insured was not using the truck and hence was not an omnibus insured at the time of the incident injuring one Cort.

The State District Court did not set forth any authority for its conclusion that the American Casualty policy was not "ambiguous" nor "is it made ambiguous by severability of interests clause". (See Conclusion II of Exhibit "A" to appellant's motion, p. 30, Brief.) Appellees submit such a conclusion is contrary to authority and reason. If it rules on the point, the Montana Supreme Court will reverse this conclusion. This may be done for two reasons:

(1) Assume the American Casualty policy is not ambiguous . . . The clear intent of the insurance industry as discussed above is that the omnibus insured is covered by the truck policy during the loading process if sued by employee of named insured. The State Judge was in error in construing the policy.

(2) If ambiguous, then the rule of the clear weight of authority would require strict construction against American Casualty.

This Cascade County case should not give this Court pause and this present appeal should be heard and argued as the calendar of the Court permits, and decision rendered in normal order. As appellant states on page 30 of his brief, this Court of Appeals is not bound by the decision of a county state court.

CONCLUSION

Appellees Walker and Hartford trust this Court does not take the view they "protesteth too much", but valid protest appeared necessary.

As suggested, this brief could well have terminated after the short discussion regarding the fact finding of ambiguity by the trial judge in the appellant's truck policy. A short judgment adopting Trial Judge Smith's Findings and Conclusions as reported in 268 F.S. 899, page 82, Transcript, is all that is required.

However, Walker and Hartford sincerely believe it has been shown, particularly since the 1955 addition of the "severability of interests" provision, that the insurance industry, including Fireman's Fund, intended to protect the omnibus insured when sued by an employee of the named insured in an occurrence arising out of the loading or unloading of the insured truck. The clear, correct and overwhelming weight of authority, both judicial and the insurance experts, so declare.

We respectfully request this Court to decide the sole issue presented by the appellant (the effect of the em-

ployee-exclusion clause) firmly in favor of the appellees for the following reasons:

(1) The insurance intent of the truck policy of Fireman's Fund was to insure Charles Walker and his employee in the fact situation arising out of the accident and subsequent State action by Stewart against Charles Walker, and this as primary insurer.

(2) The Trial Judge found as a fact that the Fireman's policy is ambiguous. Montana law is, as is basic insurance law, that ambiguity is to be construed against the carrier, Fireman's Fund. We remind the Court again of the personal exposure of appellee Walker which is the $172,000.00 tort action in State Court initiated by Stewart. Upholding the trial court would have the further result (and we submit, intended result) of affording beneficiary Stewart further protection as the Hartford policy would be available as excess coverage, in this instance.

(3) Although not necessary to the decision here, circuity of action would be avoided, as discussed in Section 7, *supra*.

Respectfully submitted this 12 day of December, 1967.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

H. L. Holt, Attorney

I certify that I served the above Brief upon the defendant and respondent in the above entitled action on the 1st day of December, 1967, by mailing a copy of said Brief by first class mail, postage prepaid, to Keller, Magnuson & Reynolds, South Annex Power Block, Helena, Montana 59601.

H. L. Holt, Attorney